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Brief for the Appellee-Respondent Sunpeace: Seventh Annual Pace National Environmental Moot Court Competition

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No. 93-214

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

UNITED STATES DEPARTMENT OF THE INTERIOR
Appellant-petitioner,
-against-
STATE OF NEW UNION
and
SUNPEACE
Appellee-respondents.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW UNION

BRIEF FOR THE APPELLEE-RESPONDENT
SUNPEACE*

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QUESTIONS PRESENTED

I. Under the Clean Air Act, did the lower court properly find that a waiver of sovereign immunity permits New Union to assess civil penalties against the United States Department of the Interior ("DOI") when DOI's Improved Coal Transport Experiment ("ICTE") was cited for violating air quality standards, ignored a warning from regulatory authorities, and persisted in its air polluting activities for three and a half years?

II. Under the National Environmental Policy Act ("NEPA") and the Administrative Procedure Act, did the lower court properly find that the Environmental Impact Statement prepared by DOI for ICTE is subject to judicial review for compliance with NEPA procedures when DOI volunteered to prepare the EIS in response to public controversy?

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STATEMENT OF THE CASE

A. *Statement of Facts*

In April 1985, the U.S. Department of the Interior ("DOI") initiated the Improved Coal Transport Experiment ("ICTE") at its Coal Research Facility ("CRACK"). (R. 3). For four years, DOI operated its ICTE project without the knowledge of state environmental agencies or private citizens. (R. 3). Although the project began in April 1985, New Union's Department of Environmental Quality ("NUDEQ") did not inspect ICTE until September 1989. (R. 3). Upon inspection of the CRACK facility, NUDEQ discovered that ICTE released coal particles into the air and promptly cited DOI for violations of New Union's Clean Air Act ("NUCAA"). (R. 3). Soon thereafter, the non-profit environmental group Sunpeace petitioned DOI to prepare an Environmental Impact Statement ("EIS") for ICTE. (R. 4).

CRACK is a facility owned and operated by DOI to study ways to make coal mining more efficient and economical. (R. 2). The facility employs 800 federal workers, which constitutes twenty percent of the New Union work force.

Under the auspices of CRACK, DOI initiated ICTE to develop a new technique to package coal for transport. (R. 3). The technique is relatively simple. Coal is heated to 400 degrees then pulverized in a machine called a "jumbler." (R. 3). Pulverized coal can be transported more economically than unprocessed coal chunks. (R. 3). The technique's environmental effects, however, are substantial. The jumbler releases dangerous quantities of coal particles into the air. (R. 3).

The particulate matter emitted by ICTE exceeds the safety limit set by the NUCAA. (R. 3). On September 30, 1989, NUDEQ inspected and cited CRACT for violating the state's air pollution standards. (R. 3). In a letter to DOI regarding the violation, NUDEQ's Administrator asserted jurisdiction to regulate the facility and explained the NUCAA air quality standards. (R. 3). No penalties were assessed at that time. (R. 3).

For the next three and a half years — September 30, 1989 until April 27, 1993 — DOI continued to operate ICTE as before. (R. 3). DOI ignored the Administrator's letter, making no attempt to comply with NUCAA. (R. 3). On April 27, 1993, NUDEQ inspected the CRACT facility again and found that DOI continued to violate the NUCAA. (R. 3). The inspector immediately notified the NUDEQ Administrator who authorized the assessment of \$300,000 in civil penalties against DOI. (R. 3).

DOI refused to submit the penalty but promised to bring ICTE into compliance with the NUCAA. (R. 3). In a letter to the NUDEQ Administrator, DOI claimed that the Clean Air Act ("CAA") did not waive the federal government's sovereign immunity from state assessment of civil penalties. (R. 3). DOI recognized its responsibility to comply with the NUCAA air quality standards. (R. 3). Without further deliberation, DOI decided to build a hangar and baghouse around the ICTE facility. (R. 3). DOI claimed that the hangar and baghouse would filter enough particulate matter to bring ICTE into compliance with the NUCAA air quality standards. (R. 3).

Finally, ICTE's environmental impacts were exposed to the public. (R. 3). Controversy ensued. Sunpeace called for the immediate suspension of the ICTE project. (R. 3). The editors of the New Union Times publicly supported Sunpeace's efforts. (R. 4).

Responding to this controversy, DOI promised to prepare an EIS for the ICTE project. (R. 4). It placed a notice in the Federal Register on June 26, 1993 stating that "even though the hangar and baghouse will not significantly affect the quality of the human environment, CRACT has determined

that it is in the public interest to prepare an EIS on the ICTE program.” (R. 4). In a single announcement, DOI published a Finding of No Significant Impact (“FONSI”) which concluded that “any operation of ICTE that complied with NUCAA standards would have no significant impact on the human environment.” (R.4). DOI further promised to prepare an EIS for ICTE. (R. 4). DOI indicated that a Record of Decision and the Final EIS would be completed one year later. (R. 4). Pending completion of the EIS, DOI pledged to reduce ICTE’s output to bring the facility into compliance with the NUCAA. (R. 4).

In December 1993, DOI published a “Draft EIS on the ICTE Program.” (R. 4). The EIS considered only two alternatives to bring itself into compliance with the NUCAA: (1) maintaining output levels and utilizing a hangar and baghouse or (2) reducing the ICTE production levels permanently. (R. 4). The EIS did not consider the “no action” alternative of terminating the ICTE project. Sunpeace submitted written comments to DOI regarding the Draft EIS. (R. 4). Sunpeace pointed out that under federal law DOI is obligated to consider the “no action” alternative in the EIS. (R. 4).

In response to Sunpeace’s comments, DOI claimed that the “no action” alternative is “outside the scope of [the] EIS and beyond the requirements of this EIS.” (R. 4). DOI opted for the previously selected alternative — building a hangar and baghouse. (R. 4). DOI then published the “Final EIS on the ICTE Program” and Record of Decision. (R. 4).

B. Procedural History

Pursuant to the CAA, New Union filed suit against DOI for refusing to submit civil penalties assessed under the NUCAA. (R. 4). Sunpeace filed suit against the DOI, based on the National Environmental Policy Act (“NEPA”) and the Administrative Procedure Act (“APA”), claiming that the EIS is inadequate. (R. 4). The two actions were consolidated by the district court. (R. 4). Sunpeace and New Union joined as amici on the suits to which they were not plaintiffs. (R. 4).

The District Court for the District of New Union concluded that DOI is liable for civil penalties under the CAA and rejected the DOI's argument that sovereign immunity shields it from such penalties. (R. 5). The court found that the CAA has a "clear and unambiguous" waiver of sovereign immunity. The Act's plain language does not limit the of civil penalties as does the language of the Clean Water Act ("CWA") and the Resource Conservation and Recovery Act ("RCRA"). (R. 5). Further, the court found that the legislative history of the CAA supports the waiver. (R. 5).

The court also held that if DOI prepares an EIS, even when not required by NEPA, the EIS must comply with the requirements of NEPA and the CEQ regulations. (R. 6). An EIS voluntarily completed will be held "to the normal standards of judicial review." (R. 6). The court then found that DOI failed to comply with the NEPA requirements because the ICTE-EIS does not discuss the "no action" alternative. (R. 6).

SUMMARY OF ARGUMENT

Sunpeace urges this court to affirm the two findings of the lower court. First, the lower court properly found that sovereign immunity does not shield DOI from civil penalties assessed under the Clean Air Act. DOI argues that a waiver must be clear and unambiguous. Sunpeace proves that the waiver in the CAA meets this burden. The statutory language of the federal facilities and the citizen suits provisions provide a broad waiver of immunity, and the legislative history supports the intent of Congress to include such a waiver. Further, the purpose of the CAA as a whole cannot be achieved unless there is judicial recognition of the waiver.

Second, the lower court properly found that the ICTE-EIS is subject to judicial review for NEPA compliance. Judicial review of an agency's compliance with NEPA is available under the APA. DOI argues that because it volunteered, and was not compelled by law, to prepare the ICTE-EIS, the EIS is not covered by NEPA. The District Court rejected this argument. Sunpeace demonstrates that DOI is required by

statute to prepare an EIS for the ICTE project. Furthermore, Sunpeace agrees with the District Court that even if DOI voluntarily prepared the ICTE-EIS, the EIS must be prepared in compliance with NEPA's procedural requirements. Judicial Review of the ICTE-EIS is necessary to compel DOI to comply with NEPA.

STANDARD OF REVIEW

The standard of review for both questions presented in this appeal is *de novo*. The first question is whether the lower court's interpretation of the CAA correctly identified a waiver of sovereign immunity to civil penalties. The second question is whether the lower court properly interpreted NEPA and the APA to permit judicial review of a voluntary EIS. The interpretation of a statute presents a question of law which is reviewed *de novo*. *E.J. Friedman Co. v. United States*, 6 F.3d 1355, 1357 (9th Cir. 1993). "Interpretations of [environmental] regulations present questions of law, which are reviewable *de novo*." *Oregon Environmental Council v. Kunzman*, 817 F.2d 484, 493 (9th Cir. 1987).

ARGUMENT

- I. THE LOWER COURT PROPERLY RULED THAT NEW UNION CAN ASSESS CIVIL PENALTIES AGAINST THE DEPARTMENT OF THE INTERIOR FOR VIOLATING AIR QUALITY STANDARDS BECAUSE SOVEREIGN IMMUNITY HAS BEEN WAIVED UNDER THE FEDERAL FACILITIES AND THE CIVIL PENALTIES PROVISIONS OF THE CLEAN AIR ACT.

DOI must submit civil penalties to the State of New Union for its violation of air pollution standards at CRACT. NUCAA is authorized under the CAA to regulate air pollution within its jurisdiction. (R. 3). New Union has the power to impose civil penalties on polluters that fail to comply with properly promulgated air quality standards. The penalties sought by New Union are well-warranted given CRACT's three and a half year failure to bring its ICTE program into

compliance with the state's particulate matter standards. DOI cannot escape liability by claiming immunity as a federal facility because the CAA contains a clear and unambiguous waiver of sovereign immunity to civil penalties.

When reviewing the CAA for a waiver of sovereign immunity, the Court must look to "the whole law, and to its object and policy." *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975). The Court must read statutory provisions not as isolated enactments but as part of a comprehensive legislative plan. If possible, every word, phrase, and passage must be given "effect" through judicial interpretation. 2A Norman J. Singer, *Statutes and Statutory Construction* § 46.06 (5th ed. 1992) (citing *United States v. Menasche*, 348 U.S. 528 (1955); *Crandon v. United States*, 494 U.S. 152 (1990) (Scalia, concurring); *Mountain States T&T v. Santa Ana*, 472 U.S. 237 (1985)). The Court must start with the "language of the statute;" however, "[i]t is a well-established principle of statutory construction that words of a statute are to be placed in their proper context by resort to legislative history where they are not conclusive as to congressional intent." *Ohio ex rel. Celebrezze v. United States Dep't of the Air Force*, 17 Env'tl. L. Rep. (Env'tl. L. Inst.) 21210 (S.D. Ohio Mar. 31, 1987) (citing *Tidewater Oil Co. v. United States*, 409 U.S. 151, 158 (1972)). The Court will find an express waiver of sovereign immunity for civil penalties under the CAA when it gives "ordinary meaning" and "common usage" to the statutory language, *Kosak v. United States*, 465 U.S. 848, 853 (1984), and reads that language in light of the Act's legislative history.

This court should recognize the clear and unambiguous waiver of sovereign immunity within the CAA's federal facilities provision, 42 U.S.C. § 7418 (1988 & Supp. V 1993), within the citizen suits provision, § 7604, and within the basic policy of the CAA as a whole. This court should affirm the district court's holding that DOI must submit civil penalties for its knowing violations of New Union's air pollution laws.

A. *The plain language and the legislative history of the Clean Air Act's federal facilities provision waive sovereign immunity to civil penalties so that New Union can assess civil penalties against the Department of the Interior.*

- (i) New Union can assess civil penalties against the Department of the Interior because the federal facilities provision waives sovereign immunity to civil penalties.

Section 118 of the CAA provides a broad waiver of sovereign immunity to civil penalties. Federal facilities such as CRACT must comply with "all Federal, State, interstate and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution." § 7418. The United States must respect air pollution standards "to the same extent as any nongovernmental entity" and is subject to "any process and sanction, whether enforced in Federal, State, or local courts . . . " § 7418(a). DOI must submit to "any" process and sanction that a court has power to enforce, including civil penalties.

Congress included words like "any" and "all" in the statutory language to effect a broad waiver of sovereign immunity to civil penalties: "The plain language of the statute reveals its expansiveness." *United States v. South Coast Air Quality Management Dist.*, 748 F. Supp. 732, 738 (C.D. Cal. 1990). Section 118 is not limited to particular sanctions or processes but is open to a full array of enforcement mechanisms. In *South Coast Air Quality*, the court found that section 118 waived the sovereign immunity of the federal government to fees and taxes. *Id.* In the same way that the court in *South Coast Air Quality* found that fees and taxes are "requirements" under section 118, this Court should find that civil penalties are "sanctions" that may be applied against DOI. *See also Hancock v. Train*, 426 U.S. 167 (1976) (overruled by congressional amendment to section 118 which established that state permits are "requirements" to which federal facilities must comply).

A waiver of sovereign immunity must be "strictly construed," *Bowen v. City of New York*, 476 U.S. 467, 479 (1986), but does not need to be expressed by a laundry list of statutory terms: "There is no requirement that Congress express its waiver by means of a list approach." *South Coast Air Quality*, 748 F. Supp. at 738. Civil penalties may be applied against DOI as "sanctions" despite the fact that section 118 does not individually list penalties and other enforcement mechanisms. See *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 183-84 (1988) (including "supplemental awards" in a waiver of sovereign immunity for "penalties" under a workmen's compensation law although such awards were not listed).

Congress affirmed that waivers of sovereign immunity may be broad when it overruled *Hancock v. Train* and amended section 118 to include expansive terms like "any" and "all":

In the committee's view, the language of the existing law should have been sufficient to insure Federal compliance in all the aforementioned situations. Unfortunately, however, the U.S. Supreme Court construed section 118 narrowly in *Hancock v. Train*

H.R. Rep. No. 294, 95th Cong., 1st Sess. (1977), reprinted in 1977 U.S.C.C.A.N. 1079. Courts are required to look for "clear and unambiguous" congressional intent to waive sovereign immunity. However, courts may not "assume the authority to narrow the waiver that Congress intended," nor "construe the waiver 'unduly restrictively,'" *Bowen*, 476 U.S. at 479 (quoting *Block v. North Dakota*, 461 U.S. 273, 287 (1983)); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 94 (1990). To read section 118 narrowly and apply a "list" approach to statutory construction would thwart congressional intent.

Congress considered and rejected a blanket application of sovereign immunity. Section 118 "shall apply *notwithstanding* any immunity of such agencies, officers, agents, or employees under any law or rule of law." § 7418 (emphasis added). By the specific words of section 118, "sanctions," such

as civil penalties, shall be applied “notwithstanding” any type of legal immunity that might be invoked by DOI as a federal entity. *See State of Alabama ex rel. Graddick v. Veterans Admin.*, 648 F. Supp. 1208, 1211 (M.D. Ala. 1986) (holding federal facility liable for civil penalties for violation of state air pollution regulations “notwithstanding any immunity of such agencies”). Embodying a broad waiver of sovereign immunity, section 118 “removed the legal barriers to full federal compliance with state air quality regulations, except for those exceptions expressly provided in that section.” *See In the Matter of Nat’l Oceanic and Atmospheric Agency Payment of Civil Penalty for Violations of Local Air Quality Standards*, Comp. Gen. B-191747, 1978 WL 9814 (C.G. June 6, 1978).

Additionally, the waiver of sovereign immunity in the CAA is distinguishable from the treatment of civil penalties under the RCRA and the CWA. The Supreme Court has held that the phrase “process and sanction” in the RCRA and the CWA indicated that there was no waiver of sovereign immunity to punitive penalties, only to “coercive” penalties necessary to enforce judicial process. *See United States Dep’t of Energy v. Ohio*, 112 S. Ct. 1627 (1992). The CAA can be distinguished from the RCRA and the CWA because it does not contain additional language that limits “sanctions” to process-related penalties.

Both RCRA and CWA include provisions not found in the CAA, defining “sanctions” as penalties that are used to “enforce an order” or to enforce “such injunctive relief” by a court. The RCRA’s federal compliance provision allows for “such sanctions as may be imposed by a court to enforce such relief . . . Neither the United States, nor any agent, employee or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief.” 42 U.S.C. § 6961 (1988). The federal facilities section in the CWA states, “the United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court.” 33 U.S.C. § 1323 (1988). The “sanctions” under the CWA and

the RCRA are distinctly linked to penalties of a "coercive" nature.

Absent such limiting language, the CAA's federal facilities section does not likewise restrain the court from enforcing civil penalties for punitive purposes. The phrase "process and sanction," standing alone, does not limit the ability of courts to enforce noncompliance penalties against recalcitrant polluters. Rather, the language of section 118 allows for any "process and sanction" to be applied against the DOI, regardless of whether the sanction is used for punitive or coercive purposes.

The statutory language of the CAA contains a clear and unambiguous waiver of sovereign immunity. In light of such an express statutory waiver, DOI cannot invoke sovereign immunity to avoid paying civil penalties for its violations of the NUCAA. The legislature did not intend to leave New Union without enforcement power merely because the polluter is a federal facility rather than a private polluter.

- (ii) New Union can assess civil penalties against the Department of the Interior because Congress intended to provide a clear and unambiguous waiver of sovereign immunity in the federal facilities provision.

This Court should look at the legislative history of the CAA to affirm that Congress intended to waive sovereign immunity and to require that federal facilities be subject to civil penalties for their air pollution violations. *See Hancock*, 426 U.S. at 167 (analyzing legislative intent of the CWA and CAA); *see also McClellan Ecological Seepage Situation v. Weinberger*, 655 F. Supp. 601 (E.D. Cal. 1986) (considering legislative intent when determining whether federal facilities subject to civil penalties under the RCRA and the CWA).

First, Congressional discussion of the CAA Amendments of 1977 demonstrates its intent to waive the sovereign immunity of the federal government in the assessment of civil penalties. The amendment was designed "to express with sufficient clarity, the committee's desire to subject Federal fa-

cilities to all Federal, State, and local requirements - procedural, substantive, or otherwise - process and *sanctions*." H.R. Rep. No. 294, 95th Cong., 1st Sess. (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1278 (emphasis added). The amendment was a broad and general waiver of sovereign immunity, and one in which there was "no need for Congress to proceed to describe an explicit waiver of every conceivable 'requirement' comprehended in the described generic category of 'requirements'." *Maine v. United States Dep't of the Navy*, 702 F. Supp. 322, 327 (D. Me. 1988).

Second, Congress intended that the states apply enforcement sanctions against all polluters including federal facilities: "The applicable sanctions are to be the same for Federal facilities and personnel as for privately owned pollution sources. . ." and "Federal facilities and agencies may be subject to injunctive relief. . .to *civil or criminal penalties, and to delayed compliance penalties*." H.R. Rep. No. 294, *reprinted in* 1977 U.S.C.C.A.N. at 1279 (emphasis added). Congress was explicit in its intent to require that federal polluters be subject to punitive, civil penalties just as private violators. This express legislative intent demonstrates that section 118 waives sovereign immunity for federal facilities.

The legislative history also reveals that one of the goals of the CAA is to establish the means necessary for state and local governments to enforce the requirements of the Act. *See* H.R. Rep. No. 294, *reprinted in* 1977 U.S.C.C.A.N. at 1079. If the states are empowered to enforce the requirements of the Act, that power must include the power to assess penalties against all violators, including the federal government. State and local governments cannot enforce the requirements of the Act if a major pollution source - the federal government - is immune.

Therefore, it would be against congressional intent and the purpose of the CAA to allow DOI to shield itself from New Union's civil penalties merely because it is a federal polluter.

B. *The Clean Air Act's citizen suit provision authorizes assessment of civil penalties against the Department of the Interior.*

Under the citizen suit section of the Clean Air Act, New Union is authorized to file suit against the federal government for violations of federal and state air pollution laws. See 42 U.S.C. § 7604(a) (1988). This section authorizes "any person" to file a civil action against individuals and entities that violate the provisions of the Act, § 7604(a), and the Act's definition of "person" includes the states. § 7602(e). DOI, as a federal "governmental instrumentality or agency" may be held liable under this provision for failure to comply with emission standards. 42 U.S.C. § 7604(a)(1)(i)-(ii) (1988 & Supp. V 1993). The district court has jurisdiction to review citizen suits and to "enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty. . . and to apply any appropriate civil penalties." § 7604(a).

From the plain language of the statute, New Union may bring a citizen suit against CRACT, a facility owned by the United States, and may receive court enforcement of "any appropriate civil penalties." Section 7604(e) reinforces the waiver of sovereign immunity for civil penalties:

Nothing in this section or in any other law of the United States shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from — (2) bringing any administrative enforcement action or obtaining any administrative remedy or sanction in any State or local administrative agency, department or instrumentality, against the United States, any department, agency, or instrumentality thereof, or any officer, agent, or employee thereof under State or local law respecting control and abatement of air pollution.

42 U.S.C. § 7604(e) (1988). This section allows states to extract "any administrative remedy or sanction" in "any State or local administrative agency" against the United States. The civil penalty assessed against the Department of Interior by NUCAA would fall under this section. Congress "specifi-

cally provided for the liability of federal agencies to pay civil penalties administratively imposed by the states.” *In the Matter of Nat’l Oceanic and Atmospheric Agency*, Comp. Gen. B-191747, 1978 WL 9814, at *1.

The waiver of sovereign immunity within the citizen suit provision is further evidenced by reading the CAA as “a whole law” and not merely just looking at individual statutory provisions. Other sections that discuss appropriate civil penalties reinforce the district court’s conclusion that Congress waived sovereign immunity for such penalties. Section 7420 of the Act describes the use of noncompliance penalties under the CAA. 42 U.S.C. § 7420 (1988 & Supp. V 1993). That section provides that “the State or Administrator . . . shall assess and collect a noncompliance penalty against every person who owns or operates . . . a stationary source which is not in compliance with an emission limitation, emission standard, standard of performance.” § 7420(a)(2)(A). As discussed above, the definition of “person” under the Act includes the United States. 42 U.S.C. § 7602(e) (1988). Since the general definition of “person” must be applied throughout the Act unless otherwise indicated, section 7420’s noncompliance penalties can be assessed against the United States, and consequently, against DOI.

The phrase “any appropriate civil penalties,” when given “common meaning” and “ordinary usage,” does not allow the government to avoid the assessment of civil penalties. The descriptive term “any” indicates Congressional intent to place the full spectrum of civil penalties at the district court’s disposal subject to court discretion as to which penalty is “appropriate” under specific circumstances.

There is no distinction between different penalties under the CAA. As discussed earlier, the Supreme Court distinguished between coercive and punitive penalties under the CWA and the RCRA based upon an analysis of the phrase “process and sanctions” and supporting statutory language. *Dep’t of Energy*, 112 S. Ct at 1637. The Court concluded that the only allowable penalties were “coercive” ones used to enforce judicial process. *Id.* Under the CAA’s citizen suit provi-

sion, the civil penalty language is carefully worded to prevent any implied relationship to court judicial process:

The district courts shall have jurisdiction . . . to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty . . . and to apply any appropriate civil penalties.

42 U.S.C. § 7604(a) (1988 & Supp. V 1993) (emphasis added). The conjunction “and” indicates that courts have the authority to assess civil penalties independent of their ability to issue injunctions and to penalize parties for noncompliance with judicial orders.

The Supreme Court’s analysis of the civil penalty provisions of the CWA and the RCRA are inapposite. See *Dep’t of Energy*, 112 S. Ct. at 1627. Under the RCRA and the CWA, a state may sue under the citizen suit section and receive civil penalties. 33 U.S.C. § 1365(a) (1988) (CWA); 42 U.S.C. § 6972(a) (1988) (RCRA). However, the civil penalty sections of the CWA, 33 U.S.C. § 1319(d) (1988), and the RCRA, 42 U.S.C. §§ 6928(a) and (g) (1988), do not provide for assessments of such penalties against the federal government. Penalties are available against “persons” who violate the CWA and the RCRA, but the United States is omitted from the statutes’ definitions of a “person” in both statutes. *Dep’t of Energy*, 112 S. Ct. at 1634-35. The omission of the United States from the civil penalty section “has to be seen as a pointed one when so many other governmental entities are specified, a fact that renders the civil penalties section inapplicable to the United States.” *Id.* at 1635. The CAA is distinguishable from the *Department of Energy* holding because as mentioned above, the CAA definition of “persons” includes the United States.

In its *Department of Energy* holding, the Supreme Court reviewed the CWA and the RCRA by “giving effect to all the language of the citizen-suit sections.” *Id.* When the Court follows the same textual analysis in the instant case, it will find that a clear and unequivocal waiver exists. Unlike under the CWA and the RCRA, a waiver of sovereign immunity is

consistent with the statutory language of the citizen suit provision of the Clean Air Act when read in light of the civil penalties provisions.

Therefore, under the CAA's citizen suit provision, sovereign immunity does not bar the assessment of civil penalties against DOI.

C. *A waiver of sovereign immunity is necessary to effectuate the purpose of the Clean Air Act.*

Policy arguments support the judicial recognition of a waiver of sovereign immunity to civil penalties under the CAA. Application of civil penalties against federal violators will ensure federal compliance with air pollution laws, foster state and local support for projects like ICTE, and protect the community of New Union from the health hazards of air pollutants. These civil penalties will not create undue economic burdens on the federal government.

First, this court should acknowledge the CAA's waiver of sovereign immunity in order to ensure federal compliance with air pollution laws. Injunctive relief does not deter federal agencies from violating clean air requirements. Unlike injunctions, civil penalties threaten federal facilities because they are assessed immediately and accrue over the time in which a violator fails to respond. See Mirth White, *Can Congress Draft A Statute Which Forces Federal Facilities To Comply With Environmental Laws In Light Of The Holding In the United States Department of Energy v. Ohio*, 15 Whittier L. Rev. 203 (1994).

Data collected by the Government Accounting Office ("GAO") supports this proposition. In the CWA, states are limited to injunctive relief against federal facilities because the Court has found no waiver of sovereign immunity. As a result, federal facilities are not complying with environmental laws when subject to injunctive penalties. Federal non-compliance with the CWA is twice that of private industry. GAO, *Report To Congressional Requestors: Stronger Enforcement Needed To Improve Compliance of Federal Facilities* 3 (1988). This indicates not only that federal facilities are not

complying, but also that private industries which are subject to civil penalties are complying at a much greater rate. Similarly, federal facilities' compliance with RCRA was also poor during the time when injunctions were the only available relief. "Despite the undisputed availability of injunctions and court-ordered sanctions to enforce them [injunctions], federal facilities have a long record of noncompliance [with RCRA]." Elizabeth Cheng, *Lawmaker as Lawbreaker: Assessing Civil Penalties Against Federal Facilities Under RCRA*, 57 U. Chi. L. Rev. 845, 861 (1990). To avoid similar results with the Clean Air Act, federal facilities must be subjected to civil penalties.

In this case, the powerful deterrent effect of civil penalties is evident. DOI reacted to NUDEQ's letter only after the NUDEQ Administrator authorized the assessment of \$300,000 in civil penalties. (R. 3). During the three and a half year period from the time when NUDEQ sent DOI its first warning letter to the time when civil penalties were assessed, DOI did not respond. (R. 3). Once NUDEQ assessed civil penalties, DOI quickly responded. The threat of civil penalties had an immediate effect. In order to achieve the goal of cleaner air, New Union needs the deterrent power of civil penalties. New Union must be able to collect the penalties from DOI and from other federal violators.

Second, civil penalties against federal violators will not create undue economic burdens on the federal government. Civil penalties ensure compliance with environmental laws and avoid the costly alternatives of cleaning up polluted sites or closing down facilities. Post-pollution cleanup and the intangible costs to human health from such pollution are staggering and far outweigh the cost of a civil penalty. See Daniel Horne, *Federal Facility Environmental Compliance After United States Department of Energy v. Ohio*, 65 U. Colo. L. Rev. 631, 656 (1994) (comparing a \$40 to \$70 billion cleanup cost at a federal facility with the lower cost of civil penalties).

Armed with a civil penalty, the state can deter polluters without having to resort to the complete shutdown of facilities. Approximately 20% of New Union workers are em-

ployed at CRACT. (R. 2). Closing the plant, even temporarily, would cause serious economic repercussions.

New Union needs to take strong action against DOI for its ongoing violations at that facility. New Union has primary authority to protect the quality of air within its jurisdiction. Allowing DOI to casually disregard the health and safety of the surrounding community infringes on the state's responsibilities and erodes public confidence in government accountability.

The people of New Union are outraged because of the activities at CRACT. People distrust CRACT, DOI, and the ICTE program. The public wants to shut down ICTE. (R. 3, 4). A civil penalty is an ideal means of addressing DOI's willful violations, thus assuaging community misgivings, while at the same time providing an avenue for future community support of ICTE. By accepting its responsibility to comply with the NUCAA and recognizing its past violations, DOI and the CRACT facility will ultimately benefit.

II. THE TRIAL COURT PROPERLY RULED THAT THE ENVIRONMENTAL IMPACT STATEMENT PREPARED BY THE DEPARTMENT OF THE INTERIOR FOR THE IMPROVED COAL TRANSPORT EXPERIMENT IS SUBJECT TO JUDICIAL REVIEW.

DOI circumvented the twin goals of NEPA — informed decision making and public disclosure — by inadequately studying the environmental impacts of ICTE. To ensure that NEPA's two procedural purposes are enforced, this court should review and reject the EIS prepared for the ICTE project by DOI.

Regardless of whether the EIS is statutorily required or was voluntarily prepared by DOI, judicial review of the ICTE-EIS is available and necessary. Judicial review provides the only assurance that DOI will comply with NEPA's minimal procedural requirements for environmental decision making.

A. *Judicial review of the ICTE-EIS is available pursuant to the National Environmental Policy Act and the Administrative Procedure Act.*

NEPA creates a zone of procedural rights that is policed by the courts under the APA. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978). Under section 102 of NEPA, federal agencies have a duty to comply with certain minimal procedures when preparing an EIS. *Id.* Under section 702 of the APA, citizens have a corresponding right to petition the court when an agency does not comply with NEPA. *Id.* Section 702 of the APA provides that “[a] person suffering legal wrong because of an agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702 (1988); *see also Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971).

This court has the power to review the ICTE-EIS under the APA and NEPA. When an EIS does not conform with NEPA’s requirements, judicial review of the EIS is available by implied judicial power and under the APA. *Calvert Cliffs’ Coordinating Comm’n v. United States Atomic Energy Comm’n*, 449 F.2d 1109, 1115 (D.C. Cir. 1971) (implied judicial review); *Environmental Defense Fund, Inc. v. Corps of Engineers of the United States Army*, 470 F.2d 289, 300 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973) (implied judicial review); *Vermont Yankee*, 435 U.S. at 542 (judicial review under APA); *Sierra Club v. Penfold*, 857 F.2d 1307, 1315 (9th Cir. 1988) (judicial review under the APA). Federal courts may exercise subject matter jurisdiction over NEPA cases as a federal question. *Natural Resources Defense Council, Inc. v. Grant*, 341 F. Supp. 356, 363 (E.D.N.C. 1972) (citing 28 U.S.C. § 1331).

NEPA requires DOI to prepare an EIS for the ICTE project and, thus DOI’s failure to file an EIS is actionable under NEPA. Even if NEPA does not require DOI to file an EIS, however, Sunpeace has a justiciable claim under NEPA and the APA. By volunteering to complete an EIS, DOI triggered

NEPA's procedural requirements and opened its EIS to judicial review.

B. *The National Environmental Policy Act requires the Department of the Interior to prepare the ICTE-EIS.*

NEPA, as implemented by the Council on Environmental Quality ("CEQ") regulations and interpreted by the courts, requires a federal agency to prepare an EIS whenever its proposed project significantly affects the human environment. NEPA § 102(2)(C), 42 U.S.C. § 4332 (1988); CEQ Guidelines, 40 C.F.R. § 1502 (1993); *e.g.*, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 336 (1988). Agencies must prepare an EIS for every project that satisfies three preliminary requirements. The project must: (1) be federal, (2) be major, and (3) have significant environmental impacts. Because ICTE satisfies each of these requirements, DOI is required by statute to prepare an EIS for the ICTE project.

First, the ICTE project is federal. An action is federal when it is "potentially subject to federal control and responsibility." 40 C.F.R. § 1508.18. Because the DOI independently owns and operates ICTE, the project is undeniably federal.

Second, the ICTE project is major. A federal action is major when it "requires substantial planning, time, resources, or expenditure." *NRDC v. Grant*, 341 F. Supp. at 366-67. The DOI has committed substantial planning and time to ICTE. The project was initiated four years ago and continues today. In addition, the DOI dedicates substantial resources and expenditures to ICTE. ICTE's parent project, the CRACT, requires 800 employees to operate. Salaries for 800 workers alone is a substantial cost. The overhead and capital costs of ICTE and CRACT are not contained in the record, but are surely substantial. Whether a project is major depends not only on the project's physical size or dollar cost, but also on the magnitude of its environmental effects. 40 C.F.R. § 1508.18 ("[m]ajor reinforces but does not have meaning independent of significantly"). Because the ICTE project has substantial on-going impacts on air quality (and possibly

on other environmental media), ICTE is a major federal action.

Third, and most importantly, the ICTE project has significant environmental impacts. NUDEQ has documented, and DOI has superficially considered, the negative impacts of ICTE on air quality. NEPA requires DOI to study the full range of ICTE's potential environmental effects. Broadly defining "significant impacts," the CEQ regulations require an agency to consider direct and indirect effects, short- and long-term effects, and cumulative impacts in an EIS. § 1508.27(a)-(b). DOI has considered only ICTE's direct and short-term effects on air quality; it has not studied the indirect, long-term or cumulative effects of ICTE on the human environment.

DOI's recent compliance with New Union's air quality standards does not nullify its duty to consider the other environmental impacts of ICTE. ICTE's impacts on other environmental media, such as water and soil, remain unstudied and unknown. Compliance with the NUCAA and NEPA are independent statutory duties. While the NUCAA sets substantive goals for air quality, NEPA outlines procedural requirements for environmental assessments prepared by the federal government. When NEPA's three trigger requirements are satisfied so that an EIS is required by statute, however, the EIS must consider the full range of significant environmental impacts.

Neither of the two narrow classes of NEPA exemptions — judicial or statutory — applies to ICTE. The courts have implied limited exemptions from NEPA compliance where an agency's procedures provide the "functional equivalent" of an EIS. *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 384-85 (D.C. Cir. 1973). Because DOI employs no other procedures to compensate for its inadequate EIS, DOI may not claim this exemption. The courts also have recognized a narrow exemption from NEPA's EIS requirement where compliance with NEPA would result in a "clear and fundamental conflict of statutory duty." *Flint Ridge Development Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 791 (1976) (thirty day maximum before disclosure notice filing made NEPA compliance

impossible); *but see*, *Jones v. Gordon*, 621 F. Supp. 7, 11 (D. Alaska 1985) (ninety day limit to issue permit did not make NEPA compliance impossible). DOI has not claimed that compliance with NEPA and another federal mandate are mutually exclusive.

Even if the court finds that the ICTE-EIS is not required by statute, but was prepared voluntarily, DOI's failure to comply with NEPA's requirements is nevertheless reviewable under the APA.

C. *Even if the Department of Interior volunteers to prepare the ICTE-EIS, the EIS must be prepared in compliance with the National Environmental Policy Act.*

When a federal agency voluntarily decides to complete an EIS, the agency must satisfy the minimum procedural requirements for agency action imposed by NEPA. While a reviewing court may not impose additional requirements, the court will require the agency to comply fully with the minimum statutory procedures outlined in NEPA. *See Vermont Yankee*, 435 U.S. at 548. When an agency promises to prepare an EIS, the courts will hold the agency to its promise. "When an agency follows a particular procedure, it is only logical to review the agency's adherence to that procedure." *Sierra Club v. Sigler*, 695 F.2d 957, 966 (5th Cir. 1983).

When the Army Corps of Engineers voluntarily adopted prospectively binding CEQ guidelines, the court reviewed an EIS prepared by the Corps for full compliance with those guidelines. *Id.* at 965. Although agencies were not required to retroactively apply the guidelines, the Army Corps elected to comply with the new guidelines. Reviewing the EIS for compliance with the CEQ guidelines that the Army Corps voluntarily adopted, the court found that the EIS was inadequate. *Id.* (following *Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79 (2d Cir. 1974)).

In another case, when the Army Corps prepared a Supplemental EIS (SEIS) that may not have been required by NEPA, the court reviewed the SEIS for compliance with

NEPA procedures. *Sierra Club v. Froehlke*, 630 F. Supp. 1215, 1228 (S.D. Tex. 1986) (enjoining the construction of a federal river project until the Army Corps took a "hard look" at the environmental consequences of the project). The court rejected the Corps argument that the revised EIS was a voluntarily prepared document for internal use, not for public disclosure. *Id.* Endorsing the premise of *Sigler* and *Callaway*, the court held that when the Corps used NEPA procedures, it "made them applicable" to judicial review of the SEIS. *Id.*

Similarly, this court should review DOI's compliance with NEPA and the CEQ guidelines, even if the court finds that DOI voluntarily decided to prepare an EIS. As the court stated in *Sierra Club v. Sigler*, "[w]hen an agency voluntarily announces its adherence to a particular regulation, it is the adherence to the regulation which should be examined by the reviewing court." *Id.* at 966. Although the courts have consistently declined to hold agencies to substantive promises made in an EIS, see, e.g., *Stryckers' Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980), courts have held agencies accountable for procedural promises made, see, e.g., *Atchison, Topeka and Santa Fe Railway Co. v. Alexander*, 480 F. Supp. 980, 993 (D.D.C. 1979) (holding that the Army Corps of Engineers must comply with procedures that it voluntarily announced in the Federal Register).

In this case, Sunpeace requests only that DOI comply with the minimum procedures outlined in NEPA and the CEQ implementing regulations. The requested procedures are not in excess of NEPA's procedural guarantees. This court should enforce DOI's implied promise to follow NEPA made when it announced its intent to prepare the ICTE-EIS.

D. Judicial Review of the EIS is necessary to effectuate the intent of NEPA.

Failure to review the ICTE-EIS would invite "abuse by agencies attempting to insulate themselves from judicial oversight mandated by the APA and NEPA." *Sierra Club v. Sigler*, 695 F.2d at 966. The courts have an essential role in

enforcing NEPA's "action-forcing" procedural mandate — informed decision making and public disclosure. *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 349 (citing *Baltimore Gas and Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983) and *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139, 143 (1981)).

The ICTE-EIS was little more than post-hoc rationalization of DOI's decision to comply with NUCAA by building a hangar and baghouse. DOI did not use either environmental assessment document to influence its decision or to educate the public. This court should exercise its power of judicial review to prevent DOI from further abdicating its NEPA responsibilities.

- (i) DOI did not consider the environmental impacts of ICTE before deciding to operate the program.

One purpose of a NEPA environmental assessment is to force an agency consider the impacts of a proposed activity *before* the agency decides to begin the activity. The purpose is not to decide how to best comply with another environmental standard *after* the activity has begun. DOI should use the EIS to decide whether to operate or terminate the ICTE project. The ICTE-EIS should not be used to justify a previously made decision about how best to comply with the Clean Air Act. Both the FONSI and the EIS are inadequate under NEPA and the CEQ guidelines.

The FONSI should have been set aside as inadequate. In its FONSI, DOI erroneously concluded that "any operation of ICTE that complie[s] with [the New Union Clean Air Act] would have no significant impact on the human environment." (R. 4). A FONSI cannot be predicated on compliance with other environmental laws. *See Calvert Cliffs*, 449 F.2d at 1125; *Kalur v. Resor*, 335 F. Supp. 1, 14 (D.D.C. 1971). In short, DOI is not excused from NEPA compliance by adhering to another environmental law.

Similarly, the EIS should be set aside as inadequate. The EIS does not discuss a sufficiently broad range of alter-

natives to the ICTE project. For an EIS to be adequate, the "no action" alternative must be discussed. §§ 1502.14(d), 1508.25(b)(1); *Comm. to Stop Route 7 v. Volpe*, 346 F. Supp. 731 (D. Conn. 1972). In addition, an adequate EIS for the ICTE project would have investigated the use of alternate energy sources, such as solar power. See *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 835 (D.C. Cir. 1972) (an EIS prepared by DOI was deemed inadequate because it did not discuss all practical alternative sources of energy before deciding to lease offshore oil deposits). The ICTE-EIS must discuss the existence of coal substitutes, including solar energy, in order to be adequate.

DOI has not realized NEPA's first purpose, consideration of the environmental impacts of a proposed project and alternatives to that project. As a consequence, DOI could not possibly realize NEPA's second purpose, public of the project's environmental impacts. DOI could not disclose what it did not consider.

- (ii) DOI has not disclosed the environmental impacts of the ICTE project to the public.

Disclosure of environmental analysis allows the public, and the courts, to monitor the agency's compliance with NEPA's procedural requirements. Without this disclosure, agencies would be left to police their own compliance with NEPA — a classic example of the "fox guarding the hen house" problem. Public disclosure, backed by the threat of judicial review, is necessary to remedy this enforcement problem.

DOI must not be permitted to devise a method of disclosure that diverts public scrutiny. When the DOI published the FONSI, it also announced its intent to prepare an EIS. (R. 4). At that time, Sunpeace immediately filed comments on the Draft EIS. (R. 4). Commenting on the draft EIS, a developing document, is a more productive endeavor than challenging the adequacy of the FONSI, a completed document. To penalize Sunpeace for commenting on the draft EIS, instead of challenging the FONSI, would give federal

agencies an incentive to prepare a “straw man” EIS to prevent the public from scrutinizing its FONSI.

Therefore, this court should exercise its power of judicial review to ensure DOI’s compliance with NEPA’s procedural mandate.

CONCLUSION

For the foregoing reasons, this court should affirm the decision of the United States District Court for the District of New Union thus enforcing civil penalties against DOI and requiring DOI to prepare the ICTE-EIS in compliance with NEPA.